YMCHWILIAD I FIL DRAFFT CYMRU

Sylwadau a gyflwynir i Gyfarfod ar y cyd rhwng Pwyllgor Materion Cyfansoddiadol a Chyfreithiol Cynulliad Cenedlaethol Cymru a Phwyllgor Materion Cymreig Tŷ'r Cyffredin

Emyr Lewis[1]

Cytunaf i raddau helaeth gyda phapur yr Athro Thomas Watkin, felly mae'r hyn sy'n dilyn yn ymhelaethu ar ddau fater (un ymarferol ac un technegol) allasai fod mewn perygl o gael eu colli.

1 Y Cyfyngiadau Newydd a'r Llysoedd

Mae'r cyntaf yn ymwneud â'r effaith ymarferol yn y llysoedd y mae'r cyfyngiadau newydd ar gymhwysedd cyfreithiol y Cynulliad yn debygol o'u cael, yn arbennig mewn perthynas â chyfraith breifat a chyfraith droseddol.

Mae'r prif bryderon a leisiwyd hyd yn hyn wedi bod ynghylch cyfeiriadau pellach gan y Twrnai Cyffredinol neu'r Cwsler Cyffredinol i'r Goruchaf Lys cyn i Fil ddod yn gyfraith, yn debyg i'r rhai yr ydym wedi eu gweld ers refferendwm 2011.

Mae fy mhryder yn ehangach na hynny. Mae'n deillio o'r ffaith y gellir codi'r cwestiwn a yw Deddf y Cynulliad oddi mewn i'w gymhwysedd deddfwriethol ai peidio oddi mewn i *unrhyw achos llys*, yn yr un modd â'r cwestiwn a yw Dedf Seneddol yn cyd-fynd â chyfraith y Gymuned Ewropeaidd neu Hawliau Confensiwn.

Mae hyn yn golygu ei bod hi'n bosibl, mewn unrhyw achos preifat neu droseddol, i herio hawliau, dyletswyddau, troseddau ayyb a grewyd gan ddeddf y Cynulliad. Mae'r profion newydd ym mharagraffau 3 a 4 yr Atodlen 7(B) newydd yn ymestyn yn sylweddoln y cyfle i herio dilysrwydd cyfreithiau. Does dim cyfyngiad amser ar hyn, felly gellir herio Deddf y Cymulliad er ei bod wedi bodoli ers blynyddoedd ac yn gweithio'n dda.

Nid y ffaith y gellir herio sydd yn fy mhryderu, ond y seiliau ar gyfer her, a'r effaith ymarferol.

Mewn achosion perthnasol yn ymwneud â chwestiynau o gyfraith breifat (e.e. achosion landlord a thenant) neu o gyfraith droseddol (e.e. erlyniad am drosedd a grewyd gan Ddeddf y Cymulliad) fe ofynir i lysoedd benderfynu nid yn unig a yw rhyw ddarpariaeth oddi mewn i gymhwysedd o ran ei phwnc, ond hefyd a yw'n bodloni'r profion yn Atodlen 7B para 3 neu 4.

Gan adael i'r naill ochr y cymhlethdod ychwanegol y mae'r paragraffau hyn yn ei greu (er enghraifft, beth yw ystyr "effect on the general application of" y gyfraith breifat neu'r gyfraith droseddol?), y pryder cyntaf yw y bydd Llys yn cael ei ofyn i benderfynu a yw'r ddeddfwriaeth yn bodloni'r profion, gan gynnwys y prawf "necessity". Felly, yr hyn fydd yn cyfri yw maentumiad Barnwyr a yw (er enghraifft) darpariaeth yn angenrheidiol (yn achos 7(B)(3)(a)) neu a yw ei effaith ar "general application" y gyfraith breifat neu'r gyfraith droseddol yn mynd y tu hwnt i'r hyn sydd ei angen (yn achos 7(B)(3)(b) a 7B(4)(b)). Daw hyn yn beryglus o agos at freinio asesiad barnwyr am faterion sydd yn rhai y dylai gwleidyddion etholedig fod yn eu gwneud. Mae "A yw hyn yn angenrheidiol?" ac "A ydym yn mynd ymhellach nag sydd yn angenrheidiol wrth greu'r drosedd hon? yn ymddangos i mi i fod yn gwestiynau y mae'n briodol i'r ddeddfwrfa eu hateb, nid y farnwriaeth. Pe bai'r cyfyngiadau hyn yn diflannu, fyddai hynny ddim yn gyfystyr â carte blanche wrth gwrs. Byddai'r Cynulliad yn

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parhau i fod wedi ei gyfyngu gan ei gymhwysedd o ran pwnc a chan gyfyngiadau cyffredinol mewn perthynas â chyfraith yr Undeb Ewropeaidd a hawliau Confensiwn,

Mae'r ail bryder yn ymwneud â'r effaith ar weinyddu cyfiawnder. Pe baent yn cael eu pasio, mae'r cyfyngiadau newydd yn debygol yn fy marn i o esgor ar gynnydd sylweddol mewn cyfreitha. Yn y maes troseddol yn arbennig (ond hefyd yn y maes suful lle bydd yr achos yn ymwneud â buddiannau pobl y mae ganddynt ddigon o adnoddau), fe allesid rhwystro prosesau, eu gwneud yn hirach neu eu hoedi drwy godi dadleuon bod y ddeddfwriaeth Cynulliad sydd dan sylw y tu hwnt i gymhwysedd am nad yw'n bodloni'r profion yn Atodlen 7B(3) neu 7B(4). Gallasai'r effaith ar erlyniadau troseddol yn arbennig fod yn debyg i effaith y ddeddf hawliau Dynol, ond heb fod â chanlyniadau mor gadarnhaol.

it may be possible to derail, lengthen and delay processes by raising arguments that the Assembly legislation being considered is outside competence, because it does not pass the tests in Schedule 7B(3) or 7B(4). The effect on criminal prosecutions in particular could be similar to the impact of the Human Rights Act, but not so benign in its consequences.

2 Awdurdodaeth a Gwrtheb Cymru a Lloegr

Awdurdodaeth yw'r ail fater. Atodaf erthygl a gyhoeddais am hyn ar Click on Wales (gwefan yr IWA) ym 2013. Mae fy mhensynnu am y pwnc wedi symud mlaen rywfaint ers hynny, ac wedi dod yn fwy eglur, ond mae'r erthygl yn mynegi cnewyllyn fy marn.

Erbyn hyn, credaf mai craidd y broblem yw nid yn gymaith awdurdodaeth (yn yr ystyr o ba lysoedd sydd yn clywed pa achosion) ond yn hytrach delio gyda'r wrtheb nad oes, fel mater o gyfraith, dim ond un cyfraith Cymru a Lloegr, ond bod y cyfreithiau sydd yn **gymwys** yng Nghymru ac y lloegr wedi ymwahanu, nid yn unig oherwydd yr hyn y mae'r Cymulliad wedi ei wneud yng Nghymru, ond hefyd yr hyn y mae San Steffan wedi ei wneud mewn perthynas â Lloegr. Ymddengys i mi bod ceisio cynnal yr wrtheb hon, a cheisio adfer yr hyn y gellir ei weld, o un safbwynt, i fod yn dir a gollwyd, wrth wraidd llawer o'r cymhlethdod yn y Bil hwn.

Byddai cydnabod bod yna gyfraith Cymru ac (wrth gwrs) cyfraith Lloegr, sydd yn estyn i diriogaethau Cymru a Lloegr, yn fan cychwyn da. Fyddai hynny ddim yn gofyn o anghenrhaid datganoli gweinyddu cyfiawnder yng Nghymru, na chreu syfdliadau Cymreig ar wahan (gweler yr adran am awdurdodaeth ym mhapur Canolfan llywodraethiant Cymru a'r Constitution Unit *Darparu Model Pwerau Wedi Cadw'n Ôl ar Gyfer Datganoli i Gymru*, tt. 24-27, y gellir dod o hyd iddo yma: http://sites.cardiff.ac.uk/wgc/files/2015/09/Devolution-Report-WEL.pdf).

ERTHYGL CLICK ON WALES Chwef 27ain 2013

http://www.clickonwales.org/2013/02/wales-continues-raggedy-devolution-path/

An interesting, if not entirely unexpected, feature of the Welsh Government's evidence to the Silk Commission published last week is that it puts the case for a so-called "reserved powers" model of law-making powers for the Assembly, but shies away from calling for a distinct Welsh legal jurisdiction.

Some commentators have raised the question of whether it is possible to have the one without the other. Indeed, in the run-up to passing the Government of Wales Act 2006, in a joint Memorandum to the Welsh Affairs Committee, Rhodri Morgan and Peter Hain explained that a "conferred powers" as opposed to a "reserved powers" model of legislative devolution is appropriate to Wales because England and Wales is (and implicitly should remain) a single jurisdiction.

The link between separate laws and a separate jurisdiction is made explicit in that Memorandum in the following passage:

If the Assembly had the same general power to legislate as the Scottish Parliament then the consequences for the unity of the England and Wales legal jurisdiction would be considerable. The courts would, as time went by, be increasingly called upon to apply fundamentally different basic principles of law and rules of law of general application which were different in Wales from those which applied in England. The practical consequence would be the need for different systems of legal education, different sets of judges and lawyers and different courts. England and Wales would become separate legal jurisdictions.

The problem with this analysis is that basic principles of law and rules of general application are not immune from being changed within the conferred powers model. Indeed, adopting the arguments applied here: http://www.clickonwales.org/2012/10/the-assemblys-legislative-limbo-land/ , they may be susceptible to more radical treatment in certain contexts under the conferred powers model. The law in England has diverged, and will continue to diverge, from that in Wales, as much by the UK Parliament legislating differently for England as by the Welsh Assembly legislating differently for Wales.

Jurisdiction means different things to different people. For many academics, the distinguishing features of a separate jurisdiction are a distinct body of laws, a distinct territory and a distinct system of courts and legal institutions. Wales already has the first two, and in many respects has the third, so how come we can't say that Wales doesn't already have a distinct jurisdiction?

The reason is rather obvious, if we use the word "jurisdiction" in the practical sense in which it is used in the UK constitutional arrangements, i.e. a system of courts which has exclusive power to determine cases arising within a particular territory. So there are 3 UK Jurisdictions - Scotland, Northern Ireland and "England and Wales". Each has its own judges and court system. Such a system of courts with exclusive powers to determine cases on a territorial basis (and having no, or only limited, reach outside their territory) cannot "emerge" from nowhere. It needs to be recognised and accepted in law. In the context of Wales, that would mean an Act of Parliament creating such a system, and delineating its powers and institutions, in much the same way as was done for Northern Ireland in the early years of the last century.

It seems that the Welsh Government's line is that it is not yet the right time to put such a system in place, but this should not hold back the reserved powers model (although, since the Welsh Government does not envisage a reserved powers model from being in place for eight years, things might change).

So how would Wales cope with a reserved powers model but no separate jurisdiction? One imagines that it would do so, at least to begin with, pretty much as it has done under the present arrangements. The Government of Wales Act 2006 squares the circle by providing that while Assembly Acts can relate only to Wales, they can extend only to England and Wales. This rather opaque formulation means (among other things) that Assembly Acts can be enforced in England. As a result courts in England can hear cases which involve questions of Welsh law only. So if (for instance) the Assembly legislated to ban the smacking of children (ie remove the defence of reasonable chastisement), a parent being tried in Nottingham on a charge of assaulting his or her child while on holiday in Aberystwyth would not be able to raise the defence of reasonable chastisement, even though he could do so if the incident had occurred in Nottingham. It is of course unlikely that Nottingham magistrates would end up hearing the case described above. Most likely it would be heard in Aberystwyth. Nevertheless, it is totally conceivable that other types of cases arising from Wales and involving questions of Welsh law would be heard in England.

That anomalous situation existed before the 2011 referendum, exists now and would still exist after a reserved powers model were put in place, unless something were done.

One answer (my preference) would be to establish by Act of Parliament a distinct jurisdiction for Wales, putting Wales on the same footing as Scotland and Northern Ireland. However that is not the only solution. Another proposal would be to remove the "extend to England and Wales" wording for the purposes of which courts can hear which cases, and give the courts in Wales exclusive power to determine Welsh cases at first instance without necessarily formally creating a distinct jurisdiction. This is (on a broader scale) much like how things used to be when only local courts had the power to hear cases relating to their territory (from Pontlotyn Magistrates in recent times to the Court of Great Sessions, abolished in 1830 which for almost 300 years had exclusive power to hear certain cases in Wales). In other words, the England and Wales system of courts can have (and has had) some courts within it which are the only ones allowed to hear certain types of cases, geographically defined. So the England and Wales jurisdiction would remain, in formal terms.

Even if this were not done, however, it seems probable that such a system would develop informally over time, building on the foundations of legal practice which already exist. After a few years, this might become a true distinct legal jurisdiction (through statute), much as the Assembly itself evolved from de facto separation of powers within a single body to true separation of powers. It's the raggedy way things happen for Wales. If so, we must hope that it happens on the basis of rational planning, rather than ad hoc reaction to changing circumstances.